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No. 427

In the Supreme Court of the United States

OCTOBER TERM, 1947

JACK TRUPIANO, ROMILDO RICCARDELLI, ANTHONY ANTONIOLE AND RIORDAN J. A. ROETT, JR., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The *per curiam* opinion of the circuit court of appeals (R. 133) has not yet been reported. The opinion of the district court (R. 123–127) is reported at 70 F. Supp. 764.

JURISDICTION

The judgment of the circuit court of appeals was entered October 7, 1947 (R. 133–134). The petition for a writ of certiorari was filed November 5, 1947. The jurisdiction of this Court is

invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a search, conducted without a search warrant but as an incident to a valid arrest for crime being committed in the presence of the officers, is unreasonable within the meaning of the Fourth Amendment merely because the officers had opportunity prior to the arrest to obtain a search warrant.

STATEMENT

The four petitioners and three other persons were arrested on the night of June 3, 1946, by investigators of the Alcohol Tax Unit, Bureau of Internal Revenue (R. 3, 10–12). On June 4, 1946, a complaint was sworn out by one of the investigators before a United States Commissioner for the District of New Jersey charging the persons arrested with various violations of the Internal Revenue Code arising out of their ownership and operation of an illicit distillery (R. 8–9). After a preliminary examination before the Commissioner on June 18, 1946 (R. 5–109), petitioners were held to answer in the District Court.[1]

[1] This latter fact does not appear in the printed record, but we have been so informed by the District Attorney for the District of New Jersey. From the same source we learn that petitioners have been indicted for the offenses charged and that the prosecution is pending.

On February 1, 1947, prior to the return of an indictment against them, petitioners filed in the District Court for the District of New Jersey a motion alleging that on the night of the arrest the government agents had illegally seized "a still, alcohol, mash and other equipment," and asking "that all such evidence be excluded and suppressed at any trial * * * and that all of the aforesaid property * * * be returned" (R. 3–4). At the hearing on the motion, petitioners offered in evidence the record of the preliminary examination before the Commissioner (R. 5–109), and the Government submitted affidavits of the agents who took part in the arrest (R. 110–122). The district court held that the search and seizure were not unreasonable and denied the motion (R. 122–128). Upon appeal to the Circuit Court of Appeals for the Third Circuit, the order of the district court was affirmed (R. 133–134).[2]

[2] Where the application for return of seized property is made after an information or indictment has been filed against the applicant, the motion is interlocutory and the order is not appealable. *Go-Bart Co.* v. *United States*, 282 U. S. 344, 356; *Cogen* v. *United States*, 278 U. S. 221, 225. It may be possible that the same rule applies where, as here, the prosecution has not progressed beyond the filing of a complaint and the holding of a preliminary hearing. The cases are not quite clear on the point. See *Go-Bart Co.* v. *United States*, *supra*; *Post* v. *United States*, 161 U. S. 583, 587; *Virginia* v. *Paul*, 148 U. S. 107, 118–122; and see Rules 40 (a), (b) (3) and 48 (a), Federal Rules of Criminal Procedure. However, the appealability of the order was conceded by the Government in the circuit court of appeals and we do not press the point here.

The evidence before the district court came entirely from the government agents and from Kell, the informer, and petitioners concede that it is not in conflict (Pet. 3). So far as it relates to the issues raised by the petition for a writ of certiorari it may be summarized as follows:

During January 1946, petitioner Roett approached Kell and proposed to rent a section of Kell's farm on which Roett would erect a building (R. 84–86). Other meetings followed, during some of which Roett was accompanied by the other three petitioners (R. 45–46, 88–89). Kell became suspicious and reported to an agent of the Alcohol Tax Unit that a still was to be erected in the building (R. 85–87, 92–93). Kell was told by the agents that he could accept Roett's offer provided he did nothing to entice or encourage petitioners into going ahead with their plans (R. 67, 78–80, 93–96). In February, one of the agents, Nilsen, was assigned to act in an undercover capacity, living and working as a hand on the Kell farm; his instructions were, not to entice or encourage petitioners in any manner, but to act the part of a "dumb farm hand" and to accept work at the still if petitioners should offer it (R. 64–66, 72, 116).

Toward the end of March 1946, Kell agreed with petitioners to let them rent part of his property for $300 a month (R. 70–71, 89–91). Kell and Nilsen assisted petitioners in the erection of the building (R. 56, 97, 113), which was

not a dwelling, but a roughly constructed barn (R. 12), situated approximately 200 yards from the Kell farm house (R. 16). Nilsen also assisted in the erection of the still and the vats (R. 56, 113), and after operations were begun on May 13, 1946 (R. 116–117), he acted as "mash man," receiving a salary of $100 a week (R. 52–56, 113). During all this period Nilsen made periodic reports to his superiors and turned over to them samples of the alcohol from the still (R. 50, 70, 75, 113, 114, 117); after May 26, 1946, he used a two-way portable radio set to contact his fellow officers, and on May 31, 1946, he supplied information which led to the seizure of a truckload of alcohol about an hour after it had left the Kell farm (R. 110, 114, 117–118).

Shortly before midnight on June 3, 1946, acting on information from Nilsen that two of the petitioners were at the still, three agents were driven to the farm by Kell in Kell's car. The odor of fermenting mash and the sound of a gasoline motor were noticeable as the car was driven on to the farm premises, and both became stronger as the agents alighted from the car and approached the building housing the still. One of the agents, Van De Car, went around one end of the building and came upon an open door through which he could see in the lighted interior a still column, a boiler, and a gasoline pump in operation. He also saw petitioner Antoniole

bending down near the pump. Acting on the theory that a crime was being committed in his presence he entered the building and placed Antoniole under arrest. (R. 10, 16–21, 111, 114–115, 118–120, 121–122.)

After the arrest, the agent "seized the illicit distillery" (R. 29, 122). He then observed in the building a large number of five-gallon cans which he found to contain alcohol and some vats which contained fermenting mash (R. 13, 122). Another agent, Casey, testified that he could see several of these cans through the open door before he entered, that he later counted the cans and found that there were 262 of them, and that after he entered he saw four large mash vats and other distillery equipment (R. 111–112). A small truck standing in a cleared space before the still house was also searched (R. 120), but it does not appear that anything was taken from it. The other six persons arrested were apprehended later as they arrived at the still premises and their persons were searched (R. 11–12). The officers did not have a search warrant (R. 15, 75).

ARGUMENT

Petitioners do not dispute that they were validly arrested while committing a felony in the presence of the officers. Their sole contention is that the subsequent search without a warrant was unreasonable, since the agents had, prior to the date of the arrest, full knowledge of the existence

of the still and ample time to obtain a warrant (Pet. 2, 3, 5, 6–10).

However, it has always been considered reasonable to search a person arrested while committing a crime and to search the premises under his immediate control as an incident to the arrest and without applying for a warrant. As this Court said in *Harris* v. *United States*, 331 U. S. 145, 150–151:

> The Fourth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law-enforcement procedures of the United States and of the individual states.
>
> The opinions of this Court have clearly recognized that the search incident to arrest may, under appropriate circumstances, extend beyond the person of the one arrested to include the premises under his immediate control. Thus in *Agnello* v. *United States* [269 U. S. 20, 30], it was said: "The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

The authorities cited by petitioners for their contention that a search cannot be made without a warrant, even as an incident to a valid arrest, when the opportunity to obtain a warrant exists, do not support that proposition. In *Taylor* v. *United States*, 286 U. S. 1, *United States* v. *Edelson*, 83 F. 2d 404 (C. C. A. 2), and *In re Milburne*, 77 F. 2d 310 (C. C. A. 2), the agents, suspecting the commission of a crime or the presence of contraband, entered the premises and proceeded to search without a warrant. But in none of these cases was there a prior arrest, followed by an incidental search. Consequently, they have no application in the present situation. The same is true of *Carroll* v. *United States*, 267 U. S. 132. There the issue was the right of federal agents to stop and search an automobile upon reasonable suspicion that it was transporting contraband. This Court recognized "a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motorboat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality". 267 U. S. at 153. However, the Court pointed out that it was discussing situations in which the search was prior to the arrest and was not dependent on the right of arrest; and the Court specifically said, "When a man is legally arrested for an offense,

whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution." 267 U. S. at 158, 159.

We think it proper to point out, although petitioners do not complain on this score, that the record reveals nothing unreasonable about the manner in which the search of the barn was conducted. The still column, the boiler, the pump, and a number of the cans of alcohol were seen through the doorway by the agents; after they entered they "saw" the remainder of the cans, the mash vats and the other distillery equipment (*supra*, pp. 5–6). There is no evidence here of a "general search or rummaging of the place." See *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344, 358. In fact, the articles would appear to have been "in plain view" of the arresting officers, so that actually "no search for them was made." See *United States* v. *Lefkowitz*, 285 U. S. 452, 465. Nor do we understand petitioners to complain about the searches made of their own persons when they were arrested. It is true that the truck was searched "thoroughly for papers and things of an evidentiary nature" (R. 120). Of course, evidentiary materials, as distinguished from the instrumentalities or fruits of crime, may not be seized even under a search warrant. *Harris* v. *United States*, *supra*, at 154. However, the record reveals no

complaint of any such seizure, and the petition does not raise any such issue. Petitioners' motion in the district court stated that the agents had "unlawfully seized their property, to wit: a still, alcohol, mash and other equipment necessary and appertaining thereto," and asked a return of "the aforesaid property" and the suppression of "all such evidence" (R. 3).[1] These objects are obviously the instrumentalities and the fruits of the crime.

CONCLUSION

The decision of the circuit court of appeals is correct, and no conflict of decisions is involved. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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[1] The notice of the motion to suppress, served upon the United States Attorney, stated that petitioners would seek return of "all papers, records and documents" seized (R. 2). But there is nothing in the record to show that such a request was ever made.

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